No. 89-1905

In the

Supreme Court of the United States

OCTOBER TERM, 1990

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WISCONSIN PUBLIC INTERVENOR, *et al.*,
Petitioners,

v.

RALPH MORTIER, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
WISCONSIN SUPREME COURT

BRIEF OF THE CONSERVATION LAW FOUNDATION OF NEW ENGLAND, INC. AND THE SIERRA CLUB AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTRODUCTORY STATEMENT

This brief is submitted by the Conservation Law Foundation of New England, Inc. and the Sierra Club as amici curiae in support of the Petitioners. Written consents of all parties have been obtained and filed with the Clerk of the Court.

INTEREST OF AMICI CURIAE

The Conservation Law Foundation of New England, Inc. ("CLF") is a non-profit, public interest, environmental law organization founded in 1966. CLF is funded by donations from thousands of private individuals and by grants and contributions from more than 40 public corporations, charitable foundations and private trusts. CLF's staff includes ten attorneys and four scientists who use law, science and

public policy analysis to pursue a wide range of environmental issues.

Pesticide use in agricultural, suburban and urban settings is a major concern. CLF has drafted and published the Massachusetts Pesticide Handbook, a primer for local regulation of pesticide application. CLF has also negotiated with utilities about pesticide uses in rights of way; participated in negotiations regarding mosquito control; and lobbied the Massachusetts legislature for pesticide laws.

The Sierra Club is a California nonprofit membership organization founded in 1892. The goals of the Sierra Club's 500,000 members are to explore, enjoy and protect the wild

places of the earth; to practice and promote responsible use of resources; to educate and enlist people to protect and restore the environment; and to use all lawful means to carry out these objectives. Both the Sierra Club and CLF are vitally interested in this case which presents issues significantly affecting future regulation of pesticide use.

SUMMARY OF ARGUMENT

Effective environmental protection requires action by federal, state and local governments. Congress, while enacting a multitude of environmental protection laws during the last three decades, has consistently and forcefully adhered to a philosophy of environmental

federalism. This approach is evident throughout the federal environmental protection scheme. Viewed within that overall context, the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y (1988), cannot sensibly be deemed to be an act that preempts all local regulation of pesticide use. (Pp. 10 to 35.)

A three-pronged test determines whether a federal act preempts state or local regulation. There must be an express preemption in the text of the statute; or there must be such a pervasive federal occupation of the field that the Court must infer that Congress left no room for state or local activity; or there must be an actual conflict with the federal

law. FIFRA fails each of these three tests.

Despite frequent amendment of FIFRA during the last 30 years, Congress has never expressly preempted local pesticide regulation. Federal preemption should not be lightly inferred in the absence of express language. Ambiguous legislative history such as FIFRA's is not a sound platform from which to infer preemption. Additionally, it provides no basis for disregarding the traditional right of state legislatures to delegate their sovereignty to towns, cities and counties. (Pp. 36 to 43.)

FIFRA does not create a pervasive federal occupation of the pesticide regulation field since it

expressly invites more stringent state legislation. 7 U.S.C. § 136v(a). Establishment of a federal floor above which states can pursue tougher regulation is consistent with other federal environmental statutes. Having been expressly invited to legislate, states should be free to delegate within their own state systems. (P. 43.)

The Wisconsin Supreme Court did not discuss whether the Town of Casey ordinance obstructs FIFRA, which is essentially a labeling, packaging and product registration statute. There is no obstruction since the ordinance focuses on the management of local <u>use</u> of pesticides only insofar as the use will affect public property or the public

itself. While many federal environmental statutes authorize the creation of federal permit systems, FIFRA leaves that part of the field open. The Town of Casey ordinance effectively fills this gap in the federal law. (Pp. 44 to 47.)

Congress left it to the states to determine whether or not local governments may regulate pesticide use. The six New England states reveal the varied approaches that state governments have chosen. Maine permits local regulation. New Hampshire's comprehensive legislation has preempted the field within the state. Connecticut and Massachusetts primarily regulate from the state level, but both jurisdictions allow various forms of

local oversight. Rhode Island and Vermont have each enacted state pesticide control schemes which appear to provide room for local action, but the question of local preemption has not been addressed by either state supreme court. (Pp. 48 to 55.)

Local knowledge of water resources, wildlife habitat, and sensitive land uses is a critical aspect of effective environmental protection. FIFRA develops various application safety standards through its product-registration process, but fails to develop any process to implement those standards at a sub-federal level. The Town of Casey ordinance is a reasonable vehicle

for utilizing local knowledge. This Court should hold that FIFRA does not preempt the Town of Casey ordinance. (Pp. 55 to 60.)

ARGUMENT

I. EFFECTIVE ENVIRONMENTAL PROTECTION DEPENDS UPON FEDERAL, STATE AND LOCAL INVOLVEMENT.

Nearly thirty years ago, in her book Silent Spring, marine biologist Rachel Carson graphically described the damage that indiscriminate pesticide spraying can inflict on people, animals, land and water. After recounting numerous incidents of damage caused by pesticides to farms and forests, suburbs and cities, Ms. Carson wrote:

> And what of human beings? In California orchards ... workers handling foliage that had been treated a month earlier collapsed and went into shock, and escaped death only through skilled medical attention. Does Indiana still raise any boys who roam through woods or fields and might even explore the margins of a river? If so, who guarded the poisoned area to keep out any who might wander in, in misguided search for unspoiled nature? Who kept vigilant watch to tell the innocent stroller that the fields he was about to enter were deadly -- all their vegetation coated with a lethal film?

R. Carson, Silent Spring, 126-127 (1987 ed.) (emphasis in original).

Since Silent Spring's 1962 publication, Congress has created a far reaching network of statutes to curb and, it is hoped, cure damage caused by pesticides and other

chemicals.[1/] Marching to the beat of the same drummer, and in many instances even more rapidly, state governments and many local lawmakers have added to the fabric of this environmental regulatory network.

In addition to FIFRA, the federal environmental safety net includes the Clean Water Act, 33 U.S.C. §§ 1251-1387 (1988); the Clean Air Act, 42 U.S.C. §§ 7401-7642 (1988) (recently amended, Pub. L. No. 101-549, 104 Stat. 2399 (1990)); the Comprehensive Environmental Response and Liability

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1/Notably, Congress itself has credited amendments to FIFRA to the impact made by Silent Spring. See H.R. Rep. No. 939, 100th Cong., 2d Sess., reprinted in 1988 U.S. Code Cong. & Admin. News 3774, 3775-76.

Act ("CERCLA"), 42 U.S.C. §§ 9601-9675 (1988); the Emergency Planning and Community Right-To-Know Act, 42 U.S.C. §§ 11001-11052 (1988); the Oil Pollution Act of 1990, 33 U.S.C.A. §§ 2701-2761 (West Supp. Dec. 1990); the Toxic Substances Control Act ("TOSCA"), 15 U.S.C. §§ 2601-2629 (1988); the Safe Drinking Water Act, 42 U.S.C. §§ 300f - 300j-26 (1988); the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4347 (1988); the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992k (1988); and the Asbestos Hazard Emergency Response Act of 1986 ("AHERA"), 15 U.S.C. §§ 2641-2655 (1988). Even these eleven

enactments do not constitute the full body of federal environmental law.

There can be little doubt that federal environmental legislation has touched every aspect of American life. The cars we drive adhere to federal air standards. The water we drink must satisfy federal water standards. The trash we discard is disposed in accordance with federal regulations. Legions of biologists, geologists and engineers work from coast to coast under the aegis of the Federal Superfund.

However broad this federal environmental mantle, though, there can also be little doubt that the role of state and local authority in environmental protection has not

been eliminated. To the contrary, active state and local involvement is critical to successful environmental protection. Congress created its far reaching environmental code fully cognizant of the fundamental precept that "the regulation of health and safety matters is primarily, and historically, a matter of local concern." Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 719 (1985). In keeping with that precept, there runs throughout the framework of all federal environmental enactments a strong and powerful current of environmental federalism.

Congressional advocacy of environmental federalism is evident in the text and legislative history

of numerous statutes. As early as 1972, in promulgating the Federal Water Pollution Control Act, Congress declared:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution .... It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

33 U.S.C. § 1251(b).

Fourteen years later, in the enactment of amendments to the Safe Drinking Water Act, firm adherence to environmental federalism was again evident. Congress required

every state to develop a wellhead protection program that would "identify ... all potential anthropogenic [i.e., man-made] sources of contaminants which may have any adverse effect on the health of persons." 42 U.S.C. § 300h-7(a)(3). The House Conference Report in support of this statute forcefully repeated the federalist theme:

> States can be expected to take a wide variety of approaches to protection of wellhead areas within their jurisdiction, and it is conceivable that each State could develop its own unique approach. Protection strategies may also vary for different protection areas within one State. The amendment recognizes that States are best able to assess specific problems within their jurisdictions, and to develop and implement necessary protection measures. As a result, no groundwater classification assigned by the Administrator is to lessen

> the level of protection assigned to an aquifer by the State in a wellhead protection area.

H.R. Conf. Rep. No. 575, 99th Cong., 2d Sess., reprinted in 1986 U.S. Code Cong. & Admin. News 1566, 1609.

The President, when signing the Safe Drinking Water Act amendments into law, concurred in the view that state and local action forms the first line of environmental defense:

> Although we certainly agree that groundwater needs to be protected from major contaminants, we believe that States have the principal role in protecting this valuable resource, and that the EPA has sufficient statutory authority to assist the States where appropriate. In fact, the Federal government can never hope adequately to protect the groundwater resources of America without the major participation and indeed

> the leadership of State and local communities, and S. 124 reflects this important understanding.

Statement by President Ronald Reagan Upon Signing S. 124, 22 Weekly Comp. Pres. Doc. 831 (June 23, 1986), reprinted in 1986 U.S. Code Cong. & Admin. News 1566, 1615.

Congress has preempted state and local environmental activity in only limited and narrow instances. For example, when an information system is necessary for the gathering and distribution of science and safety knowledge, Congress has mandated the uniform, nationwide use of certain forms. See the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11041(b) (state and local material safety data sheets

shall "be identical in content and format ...."). Elsewhere, since the trip from one's home to work or even to the local convenience store frequently crosses town lines and in some areas even state lines, Congress has preempted the establishment of automobile and fuel emission standards. See 42 U.S.C. § 7543(a). Even so, the specific field of emission control has not been fully occupied, see Allway Taxi, Inc. v. City of New York, 340 F. Supp. 1120, 1124 (S.D.N.Y.), aff'd, 468 F.2d 624 (2d Cir. 1972), and the broader field of air pollution prevention is most certainly a federal, state and local activity. See Washington v. General Motors Corp., 406 U.S. 109, 114 (1972)

("Congress has not, however, found a uniform, nationwide solution to all aspects of [air pollution] and, indeed, has declared 'that the prevention and control of air pollution at its source is the primary responsibility of States and local governments.'").

Another consistent characteristic of federal environmental laws is that Congress does not impose federal environmental standards as ceilings beyond which state or local lawmakers cannot proceed. Rather, federal health and safety laws act as floors below which states and local governments may not set standards. In FIFRA, see 7 U.S.C. § 136v, and in numerous other federal acts, states are invariably

free to impose more stringent environmental protection than federal law requires.

Having permitted the states to impose more stringent standards in the environmental sphere, it follows from the federalist principles underlying our constitutional system that "[s]tate legislatures may not only exercise their sovereignty directly, but may delegate such portions of it to inferior legislative bodies as, in their judgment, is desirable for local purposes." Walla Walla v. Walla Walla Water Co., 172 U.S. 1, 9 (1898). See also Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985) ("[W]ithin the realm of authority left open to them under the

Constitution, the States must be equally free to engage in any activity that their citizens choose ...."). The principle that states may experiment with different ways to solve environmental problems and delegate differing amounts of power to the local governments within the states, thus, lies at the heart of the federal system.

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences for the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting). Examples of Congress'

carefully refraining from heavy-handed preemption and of leaving the door open for more stringent state and local environmental action are myriad.

TOSCA preserves "the authority of any State or political subdivision of a State to establish or continue in effect regulation of any chemical substance, mixture, or article containing a chemical substance or mixture." 15 U.S.C. § 2617(a)(1). There are only two exceptions. First, states and localities may not impose duplication of testing required by the federal government. 15 U.S.C. § 2617(a)(2). Second, states may not create rules where the federal Environmental Protection Agency

("EPA") has done so unless the State rule is identical to the federal version; enacted pursuant to any other federal law; or, notably, unless the State rule "prohibits the use of such substance or mixture in such State or political subdivision." Id. See also Sed, Inc. v. City of Dayton, 519 F. Supp. 979, 990 (S.D. Ohio 1981) ("Deference to, or nonpreemption of state regulation which serves the purposes of other existing federal environmental legislation, even if only remotely or incidentally, was similarly and clearly intended.") (emphasis in original).

NEPA, though not itself applicable to the states unless a partnership exists between the federal and

state governments on a specific project, see Proetta v. Dent, 484 F.2d 1146, 1148 (2d Cir. 1973), expressly recognizes the importance of cooperation on environmental issues among federal, state and local governments:

> The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, ... declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, ... to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony ....

42 U.S.C. § 4331(a).

CERCLA follows the "federal environmental floor" approach by declaring that none of its provisions "shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State." 42 U.S.C. § 9614(a). While excluding applications of registered pesticides from certain sections, CERCLA also expressly preserves "obligations or liability" under any other State or Federal law for damages resulting from the release, removal or remediation of "hazardous substances," 42 U.S.C. § 9607(i), a term which includes numerous pesticides: captan, carbaryl (sevin), chlordane,

DDT, diazinon, malathion and parathion. 40 C.F.R. § 116.4, Table 116.4A.

RCRA recognizes that "the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies ...." 42 U.S.C. § 6901(a)(4). An objective of RCRA is the establishment of "a viable Federal-State partnership...." 42 U.S.C. § 6902(a)(7), and the statute allows state and local imposition of more stringent solid waste disposal requirements. 42 U.S.C. § 6929.

The Oil Pollution Act of 1990 allows State and local governments to exceed federal liability and removal requirements for oil spills.

33 U.S.C.A. § 2718. Notably, the legislative history declares:

> The issue of Federal preemption of State laws is one that often arises during the formulation of legislation which imposes Federal environmental controls. To date, Federal legislation has affirmed the rights of States to protect their own air, water, and land resources by permitting them to establish State standards which are more restrictive than Federal Standards.

Senate Report (Environment and Public Works Committee) S. Rep. No. 94, 101st Cong., 1st Sess., July 28, 1989.

Against this panoply of federal environmental law, the Wisconsin Supreme Court's holding that, by implication, FIFRA preempts a local ordinance regulating pesticide use is aberrational as a matter of

federal policy as well as a sharp departure from well established pre-emption principles. The common-sense reading of FIFRA is Petitioner's: the statute is a labeling and licensing law, not a law that regulates every conceivable pesticide use in every hamlet in the United States. Recognizing the fact that pesticides generally are produced by a handful of large manufacturing corporations, then distributed nationally and even internationally, Congress has decided it is economic and efficient to use federal power to centralize and standardize the registration and description of pesticides. It strains credibility, however, to think that Congress intended the EPA

and the state governments -- without any local regulatory activity -- to oversee the proper application of pesticides in every climate, over every varied topography, or in every workplace, restaurant, hospital or apartment building in the United States.

Safe use of chemicals in the environment requires a detailed knowledge of local conditions: prevailing winds at different times of the day, the presence or absence of surface water or groundwater, the directional flow of groundwater, the local topography, and local land uses, the seasonal habits of local fish, fowl and other wildlife and in some instances even their daily habits. The importance of local

knowledge is illustrated by a study of pesticide use conducted in Texas:

> Weather-related elements including horizontal and vertical air movements, air temperature, and relative humidity in the immediate application area all affect drift....
>
> The weather factor most commonly associated with drift is horizontal wind speed. However, estimating drift is not a simple function of knowing wind speed. Wind speed, and thus drift, will increase with height because objects on the ground (particularly crops) have the effect of slowing down wind speed in the affected area. The effects of horizontal wind speed also depend on the type of ground surface in the area -- not just terrain but crops as well. For instance, when studying air movements over two fields, researchers found fairly regular increases in wind speed (with height) in a wheat field, but in a beet field there was substantial turbulence.

Policy Research Project on Pesticide Regulation in Texas, The University of Texas at Austin, Regulating Pesticides in Texas, A Report of the Lyndon B. Johnson School of Public Affairs Policy Research Project on Pesticides in Texas (September 11, 1984) at 118-119.

Surely a local official is more likely than a federal or state administrator in a far-away city to know where local water supplies exist, what times of day local weather is likely to increase or decrease pesticide drift, and what times and places pesticide application will subject residents and

animals to risk.[2/] Chemicals dispersed into the environment -- whether outdoors in fields or indoors in restaurants and nursing homes -- have their greatest impact locally. Surely the intent of FIFRA is to minimize environmental harm. Achieving that objective requires that regulators try to calibrate the use of chemicals as precisely as possible. That calibration is best achieved by the involvement of local

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2/"The administration and enforcement of federal laws and regulations necessarily are largely in the hands of staff and civil service employees. These employees may have little or no knowledge of the States and localities that will be affected by the statutes and regulations for which they are responsible." Garcia, 469 U.S. at 576 (Powell, J., dissenting).

as well as federal and state officials in pesticide use.

II. FEDERAL LAW HAS NOT PREEMPTED LOCAL REGULATION OF THE USE OF PESTICIDES.

Application of the test for federal preemption to the language and purpose of FIFRA shows that FIFRA does not preempt municipal regulation of pesticides. Under the Supremacy Clause, federal law may supercede local law in any of three ways. Congress may preempt state or local authority by simply stating so in express terms. Hillsborough, 471 U.S. at 713; Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). In the absence of express language, Congress' preemptive intent may be inferred only from a pervasive scheme of federal regulation that

leaves no room for supplementary state or local regulation. E.g., Hillsborough, 471 U.S. at 713; Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). Federal legislation also preempts any state and local laws that actually conflict with or present an obstacle to the federal law. Jones, 430 U.S. at 525-26.

A. FIFRA Does Not Explicitly Preempt Municipal Regulation.

No language in the text of FIFRA itself expressly excludes local governments from regulating the use of pesticides. See 7 U.S.C. §§ 136-136y. Congress could easily have accomplished local preemption in FIFRA by adding five words -- "but not its political subdivisions" -- to the text of 7 U.S.C.

§ 136v(a). Despite numerous amendments to FIFRA in the last thirty years, however, Congress has never done so.[3/]

Ignoring the requirement that express preemption requires there to be express language, the Wisconsin Supreme Court incorrectly deduced that because Congress did not include the phrase "political subdivision" in its statutory definition of "State," Congress intended to deprive political subdivisions of

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3/ For example, the Clean Air Act expressly preempts state and political subdivisions with respect to vehicle emissions and fuel composition. 42 U.S.C. § 7543(a) ("No state or political subdivision thereof shall adopt [any emissions standards for new motor vehicles].") (emphasis added).

any authority over pesticides. See Mortier v. Town of Casey, 154 Wis. 2d 18, 29, 452 N.W.2d 555, 560 (1990). Congress, however, simply defined the term "State" to mean "a State." See 7 U.S.C. § 136(aa). It has done this on numerous occasions in other environmental statutes.4/

Ironically, the oxymoronic holding that FIFRA expressly, by implication, preempts local regulation ignores traditional principles

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4/ See the Clean Water Act, 33 U.S.C. § 1362(3); the Clean Air Act, 42 U.S.C. § 7602(d); TOSCA, 15 U.S.C. § 2602(13); CERCLA, 42 U.S.C. § 9601(27); RCRA, 42 U.S.C. § 6903(31); the Emergency Planning and Community Right-To-Know Act, 42 U.S.C. § 11049(9); and the Safe Drinking Water Act, 42 U.S.C. § 300f(13).

of state sovereignty that make a state free to delegate its powers to its political subdivisions. Walla Walla, 172 U.S. at 9; Central Maine Power Co. v. Town of Lebanon, 571 A.2d 1189, 1192 (Me. 1990). Given the historical importance of a state's right to delegate its powers in our federal system, preemption of that right should not be accomplished by the guesswork of implication or by dependence upon muddled legislative history.

Contrary to the ruling of the Wisconsin Supreme Court, the legislative history does not demonstrate a "clear and manifest purpose of Congress" to preempt local regulations. See Jones, 430 U.S. at 525. It is inappropriate to discern

"clear and manifest" congressional purpose from legislative history alone, especially where the legislative history itself is inconclusive.[5/] The legislative history

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5/"The question whether federal law preempts state action, cannot be reduced to general formulas, but there does appear to be an overriding reluctance to infer preemption in ambiguous cases.... [T]o give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which Garcia [v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985)], relied to protect states' interests." L. Tribe, American Constitutional Law, 479-80 (2d ed. 1988) (emphasis in the original).

As the plain language of the statute is clear, resort to legislative history would not appear to be proper. National Agricultural Chemicals Ass'n v. Rominger, 500 F. Supp. 465, 469 (E.D. Cal. 1980).

of FIFRA arrived at very different conclusions. Compare COPARR, Ltd. v. City of Boulder, 735 F. Supp. 363, 366 (D. Colo. 1989); People ex rel. Deukmejian v. County of Mendocino, 36 Cal. 3d 476, 492; 683 P.2d 1150, 1160; 204 Cal. Rptr. 897, 907 (1984); Town of Lebanon, 571 A.2d at 1193 with Maryland Pest Control Ass'n v. Montgomery County, 646 F. Supp. 109, 113 (D. Md. 1986), aff'd without opinion, 822 F.2d 55 (4th Cir. 1987); Professional Lawn Care Ass'n v. Village of Milford, 909 F.2d 929 (6th Cir. 1990). Given the views of some, but not all, legislators in favor of preemption, Congress adopted a compromise position of neutrality that left the states free to distribute authority

between themselves and their political subdivisions if they choose.[6/] See County of Mendocino, 36 Cal. 3d at 492, 683 P.2d at 1160, 204 Cal. Rptr. at 907. In sum, the absence of express preemption in FIFRA's text, and the ambiguous nature of the legislative history, combined

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6/ The legislative history behind the subsequent 1988 FIFRA amendments reveals that Congress recognized that localities engage in regulation of pesticide use:

> Concern about the inadequacy of data that support current pesticide regulations fuels much of the controversy surrounding pesticide use. Such concern, in turn, reinforces the desire by States and their political subdivisions to assert greater control over pesticide use.... (emphasis added)

H.R. Rep. No. 939, 100th Cong., 2nd Sess., reprinted in 1988 U.S. Code Cong. & Admin. News 3474, 3478.

with the traditional presumption against preemption warrants the reversal of the Wisconsin Supreme Court.

B. FIFRA Does Not Create a Pervasive Federal Regulatory Scheme.

Congress did not create a federal scheme under FIFRA that is so pervasive as to preclude supplementation by other levels of government. In fact, Congress explicitly invited action by other governments in the area of pesticide regulation. See 7 U.S.C. § 136v. That provision alone eliminates the need for the Court to consider whether a pervasive federal scheme exists or whether Congress intended to occupy fully the field of pesticide regulation. The statutory text expressly proves that Congress had no such intention.

C. The Town of Casey Ordinance Does Not Conflict With FIFRA, Nor Is It An Obstacle To FIFRA.

A conflict between state and federal law exists only when the state law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" Jones, 430 U.S. at 526 (quoting Hines v. Davidowitz, 312 U.S. 351, 363 (1941)), or "when compliance with both federal and state regulations is a physical impossibility." Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142-43 (1963). The Wisconsin Supreme Court did not rule on whether the Town of Casey ordinance conflicts with FIFRA, and the U.S. government agrees with the Petitioner that the ordinance is not

preempted. See Brief for the United States as Amicus Curiae on Petition For a Writ of Certiorari at 4. The Town of Casey ordinance simply fills in a gap in federal and state pesticide regulations.

FIFRA regulates the labeling and packaging of pesticides, registration of products under categories for general or restricted use and certification of applicators of pesticides. See 7 U.S.C. §§ 136-136y. The Town of Casey ordinance, on the other hand, consists of notice requirements to inform neighbors and passers-by and permit requirements to protect the local community, its inhabitants and the environment. See Town of Casey ordinance, Ordinance No. 85-1, § 1.3. It

governs the time, place and manner of the actual pesticide application, a matter that directly affects the local community. See id. See also New York State Pesticide Coalition v. Jorling, 874 F.2d 115, 120 (2d Cir. 1989) (court held that FIFRA did not preempt state notification requirement because "Congress intended to moderate the behavior of people who sell and apply pesticides," but "New York provisions are designed to warn the public....").

Unlike other federal environmental laws, FIFRA does not establish a permit system for the application of pesticides. Compare, for example, the Clean Air Act, 42 U.S.C. §§ 7401-7642, and the Clean Water Act, 33 U.S.C. §§ 1251-1387,

which authorize federal emission and discharge standards as well as the implementation of federal permit schemes. The Town of Casey ordinance fills in the use-permit gap in pesticide regulation.

FIFRA also lacks notice requirements to protect passers-by and abutters. Nor does it address setback distances for surface water and groundwater supplies. Again, the Town of Casey ordinance provides a vehicle for filling these gaps. Rather than obstruct the federal packaging and labeling scheme, the ordinance assists in fulfilling the overall federal goal of environmental protection.

III. CONGRESS LEFT IT TO THE STATES TO DETERMINE WHETHER LOCALITIES MAY OR MAY NOT REGULATE PESTICIDE USE.

FIFRA, except for setting a federal floor below which sale or use regulation may not dip, does not tell the fifty states how to regulate pesticide use. FIFRA's dictate is permissive: "A state may regulate the sale or use of any federally registered pesticide ...." 7 U.S.C. § 136v(a) (emphasis added). Accepting this federalist invitation, different states have pursued different approaches.

A. The Six New England States Have Taken a Varied Approach to Local Pesticide Use Regulation.

Although a fifty-state survey is beyond the scope of this brief, the activities of the six New

England states are indicative of a varied approach.

Maine provides that municipalities may petition the Board of Pesticides Control (the "BPC") for the establishment of "critical areas" and comment on mandatory pesticide management plans. Me. Rev. Stat. Ann. tit. 22, § 1471-M (Supp. 1990). In addition, in recognition of the existence and need for local pesticide ordinances, Maine law requires the BPC to maintain a centralized listing of municipal ordinances related to pesticide storage, distribution or use. See Me. Rev. Stat. Ann. tit. 22, § 1471-U (Supp. 1990). The Maine Supreme court has held that neither the Pesticide Control Act,

Me. Rev. Stat. Ann. tit. 7, §§ 601-625 (1989), nor the Pesticide Board Act, Me. Rev. Stat. Ann. tit. 22, § 1471-A, preempts local pesticide ordinances. Town of Lebanon, 571 A.2d 1189 (Me. 1990).

New Hampshire has also enacted a number of pesticide laws. See N.H. Rev. Stat. Ann. §§ 430:1-430:48 (1990). The New Hampshire Supreme Court has ruled that the state legislature fully occupied the field by virtue of its pesticide enactments. Accordingly, New Hampshire localities may not enact pesticide ordinances. Town of Salisbury v. New England Power Co., 121 N.H. 983, 437 A.2d 281 (1981).

Vermont regulates the "sale, use, storage, treatment and disposal

of pesticides and pesticide wastes" through the Commissioner of Agriculture, Food and Markets. Vt. Stat. Ann. tit. 6 §§ 911-929, 981-986, 1021-1025, 1082-1084, 1101-1111 (1988 & Supp. 1990). These statutes do not expressly address local pesticide use control, and the issue has not been addressed by the Vermont Supreme Court. Notably, however, the Vermont Water Pollution Control Law alludes to "federal, state and local laws and regulations" (emphasis added) in the context of herbicide and pesticide use. See Vt. Stat. Ann. tit. 10 § 1283(g)(2)(B) (Supp. 1990).

Rhode Island has enacted the Pesticide Control Act of 1976, R.I. Gen. Laws §§ 23-25-1 - 23-25-36.

The act is administered by the Director of Environmental Management. The act does not speak to local regulation, and the issue apparently has not been litigated.

Connecticut expressly allows some local regulation of pesticide use. The Connecticut Pesticide Control Act, Conn. Gen. Stat. Ann. §§ 22a-46 - 22a-66z (West 1985 & Supp. 1990), gives the Commissioner of Environmental Protection "exclusive authority in the regulation of pesticide spraying," id., § 22a-54(a), but also declares that "[p]ermits for aircraft spraying in congested areas shall be issued only with the approval of the director of health of the municipality in which

the operation is to be conducted." Id., § 22a-54(e)(4).

In the Commonwealth of Massachusetts, as of 1988, over 50 towns had passed regulations relating to pesticide control. See Commonwealth of Massachusetts Department of Environmental Quality Engineering, Pesticide Regulation in Massachusetts: An Analysis of Local, State, and Federal Controls at 1 (February 1988) [hereinafter "Pesticide Regulation in Massachusetts"]. Although significant portions of local power have been preempted by state legislation and regulation, see Town of Wendell v. Attorney General, 394 Mass. 518, 476 N.E.2d 585 (1985), localities may still require pesticide applicators to appear before boards of

health to demonstrate that pesticides will only be used in accordance with the law. Id.

Consequently, Massachusetts communities have enacted zoning by-laws, general by-laws, board of health regulations and advisory resolutions that regulate pesticide-related activities in specific sensitive areas. Pesticide Regulation in Massachusetts at 1, 2, 15. The Attorney General must first approve the zoning by-laws and the general by-laws,[7/] but local board of health regulations do not require

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7/This approval process involves all town zoning by-laws and general by-laws, not just pesticide enactments. See Mass. Gen. L. ch. 40, § 32 (1988); ch. 40A, § 5 (1988).

such approval. Id. at 4-6; Mass. Gen. L. ch. 111, § 31 (1988 & 1990 Supp.).

B. Local Regulation Can Play An Important Role In Reducing Pesticide Damage.

Local ordinances such as the one promulgated by the Town of Casey can play an important role in preventing harm to the community. The ordinance sets up a simple permit and notification framework that neither FIFRA nor the Wisconsin state statutes governing pesticides address. The ordinance applies only to pesticide applications directly affecting the public, either by application to land owned or used by the public or by aerially spraying, which by its very method may drift onto other lands or into private

residences. See Preamble to Town of Casey Ordinance 85-1 ("aerial spraying of pesticides increases the risk of injury or damage to persons, property and the environment, due to the increased likelihood of pesti cide drift and pesticide overspray").

A pesticide applicator must submit information that describes the purpose of the pesticide application, the date and time, a description of the location, an identification of the pesticide, the existence of available pest-control alternatives, the anticipated impact of the application, and a description of the precautions the applicator intends to take. Ordinance 85-1, 1.3(2). The ordinance also provides for a hearing if the Board

initially rejects or restricts the request. Id., § 1.3(4), (5). The ordinance also provides for notification of the impending application by use of placards at least 24 hours prior to the application. Id., § 1.3(7).

Under the terms of the ordinance, the Town may deny or impose conditions on a permit for reasons "related to the protection of the health, safety and welfare" of the town residents. Id., § 1.3(3). The Town may require that a pesticide application be confined to an area that the public does not use for recreation or that the person utilize a method of ground application of the pesticide rather than aerial spraying. Id.

Without a system in place for review of specific pesticide applications for areas of public concern, communities are at a serious disadvantage in protecting themselves -- their residents, animals, land and water -- from exposure to potentially hazardous substances. Although the use of pesticides to control weeds and minimize crop damage has led to improvements in agricultural productivity, "it has also led to increased risk of harm to humans and the environment." Ruckelshaus v. Monsanto Co., 467 U.S. 986, 990 (1984).

Communities that bear the direct risk of harm should be the ones to assess "the likelihood of

individualized risks" and how such risks could adversely affect their lives and their environment. See generally id. at 1016 ("public disclosure [of trade-secret data pursuant to FIFRA] can provide an effective check on the decision-making processes of EPA and allows members of the public to determine the likelihood of individualized risks peculiar to their use of the product"). Without state and local participation, protection against the risks of pesticide use will remain incomplete.

IV. CONCLUSION

For the reasons set forth above, and for the reasons set forth in Petitioners' brief, the Conservation Law Foundation and the Sierra Club urge the Court to reverse the Wisconsin Supreme Court by holding that FIFRA does not preempt the Town of Casey ordinance.

Respectfully Submitted,

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